Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-515

FEHR BROTHERS, INC., *Petitioner*
v.
ACCIAIERIE WEISSENFELS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

ROBERT D. WALLICK
Attorney for Respondent

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2050

Of Counsel:

RICHARD O. CUNNINGHAM
F. JOSEPH NEALON
STEPTOE & JOHNSON

WILLIAM H. ARNOLD, III
ARNOLD, ARNOLD, LAVENDER & ROCHELLE, LTD.
507 Hickory Street
P.O. Box 1938
Texarkana, Arkansas 75501

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 5

I. The Decision Below Is Consistent with the Opinions of this Court 5

II. There is No Conflict Between the Decision Below and the Decisions of Other Courts of Appeals .. 9

CONCLUSION 17

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:

Aftanase v. *Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) 15

Ajax Realty Corp. v. *J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ..12, 14, 15

Duple Motor Bodies, Ltd. v. *Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) 12, 13, 14

Eyerly Aircraft Co. v. *Killian*, 414 F.2d 591 (5th Cir. 1969) 12, 13

Gray v. *American Radiator & S.S. Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) 16

Hanson v. *Denckla*, 357 U.S. 235 (1958) 5, 6, 9, 11, 16

Honeywell, Inc. v. *Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975) 13, 14

International Shoe Co. v. *State of Washington*, 326 U.S. 310 (1945) 5, 6, 9

Kansas City Southern Railway v. *Anderson*, 233 U.S. 325 (1914) 9

Kulko v. *Superior Court of California*, 98 S. Ct. 1690 (1978) 5

Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972) 12

Page

McGee v. *International Life Insurance Co.*, 355 U.S. 220 (1957) 5, 7
Pendzimas v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961) 10
Shaffer v. *Heitner*, 433 U.S. 186 (1977) 5
Uppgren v. *Executive Aviation Services, Inc.*, 304 F. Supp. 165 (D. Minn. 1969) 16
Velandra v. *Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) 10, 11
Weaver v. *Palmer Brothers Co.*, 270 U.S. 402 (1926) .. 9
W. T. Grant Co. v. *Unitika Tsusho KK*, Civ. No. 74-285 (D. Vermont, October 27, 1977) 10, 11, 12

STATUTES:

ARK. STAT. ANN. § 27-2502(C)(1)(d) 3

MISCELLANEOUS:

Restatement (Second) of Foreign Relations Law § 18 (1965) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-515

FEHR BROTHERS, INC., *Petitioner*

v.

ACCIAIERIE WEISSENFELS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

COUNTER-STATEMENT OF THE CASE

The petitioner in this case is Fehr Brothers, Inc. (hereinafter "Fehr Brothers"). It is a New York corporation with its principal place of business in New York City. Petitioner is also the American subsidiary of a British corporation, Frank Fehr & Co., Ltd. (hereinafter "the British parent"; petitioner and its parent are herein referred to collectively as "the Fehr organization"). Respondent is Acciaierie Weissenfels, s.p.a. (hereinafter "Weissenfels"), an Italian corporation which has sold chains to the Fehr organization.

The petition for certiorari arises out of a personal injury action filed in the U.S. District Court for the Western District of Arkansas. Two men working in Murfreesboro, Arkansas were injured on May 9, 1976 when a three-eighths inch chain broke. Their employer had purchased the chain from the Carroll Building and Appliance Co. of Murfreesboro. The chain bore the imprint "Yugoslavia" and was taken from an open barrel sitting on the floor of that hardware store. The open barrel bore the label FAIRLINE, the trademark used by petitioner. The fact that the barrel was one used by the Fehr organization is the only evidence that has been advanced to link this Yugoslav chain with respondent, an Italian corporation having no production facilities in Yugoslavia.[1]

In their diversity action, the injured workmen named as defendants both petitioner Fehr Brothers and respondent Weissenfels. The plaintiffs initially claimed that respondent had manufactured the chain in question. Subsequently, they conceded that respondent could not have manufactured the chain. District Court Memorandum of August 22, 1977 (hereinafter "Dist. Ct. Op."), Petn at A-31. Plaintiffs now claim that respondent purchased the chain from a manufacturer in Yugoslavia, repackaged it under petitioner's trademark, and sold it to petitioner. Petitioner allegedly resold the chain to an Arkansas wholesaler, which in turn resold it to Carroll Building and Appliance Co., which finally resold it to plaintiffs' employer. Respondent

[1] Discovery has adduced evidence of other possible sources from which Carroll Building and Appliance Co. may have obtained the Yugoslav chain. In fact, one of the parties has filed a cross-complaint against an American company which imports Yugoslav chain.

has consistently denied that it manufactured, purchased or repackaged the particular chain in question.[2]

Respondent Weissenfels has its principal place of business at Fusine, Italy. Respondent is not licensed to do business in Arkansas and has never transacted any business in the state. Respondent has never had an office or place of business in Arkansas. No employee or representative has ever visited Arkansas on its behalf. Respondent has never entered into a contract to sell any products or services in Arkansas, nor has it ever solicited or advertised for business in that state. In particular, respondent has never sold or shipped chain into Arkansas.

During the period relevant to this case, respondent had a sales agreement with Frank Fehr & Co., Ltd., the British parent of petitioner. This agreement gave the British parent the exclusive right to sell chain manufactured by respondent in certain specified areas, including the whole of North America. Under the agreement, the Fehr organization had the exclusive right to resell and invoice the chain in its own name. For most of the United States, petitioner was the British company's selling arm. The Fehr organization always exercised complete control over the selection of its customers and all other marketing decisions. After the chains were placed on ships in Italy, respondent had no interest in or control over them. All of the chains sold by respondent to the Fehr organization were marketed by the Fehr organization under its own brand name, FAIRLINE.

Jurisdiction over respondent was asserted on the basis of Arkansas Stat. § 27-2502(C)(1)(d), which pro-

[2] For purposes of the interlocutory appeal, the Court of Appeals assumed that respondent repackaged the chain. Petn. at A-3.

vides that a court may exercise jurisdiction over a person who causes tortious injury in the State by an act or omission outside the State "if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State." The complaints filed in these personal injury actions did not allege that respondent had derived any revenues from business in Arkansas. They did, however, allege that petitioner had derived substantial revenues—later stated by petitioner to be $74,551.35—from the sale of Weissenfels chains in Arkansas during the period 1972-76.[3]

Respondent moved to dismiss the complaint on the ground that the District Court lacked personal jurisdiction over it. The District Court denied this motion, but certified the question to the Court of Appeals for the Eighth Circuit. The Eighth Circuit initially affirmed the trial court by a divided vote. Petn at App. B. On rehearing *en banc*, however, the Court of Appeals held that the exercise of jurisdiction over respondent in the circumstances of this case would violate its right to due process under the Fourteenth Amendment. Opinion of August 18, 1978 (hereinafter "En Banc Op."), Petn at App. A.

Fehr Brothers, Inc. seeks a writ of certiorari to review that decision. For the reasons stated herein, that petition should be denied.

---

[3] Although the courts below accepted this assertion, subsequent discovery has revealed that during the relevant time period, the Fehr organization bought chain from other sources, including Yugoslavian manufacturers. It is not clear what portion, if any, of the $74,551.35 relates to respondent's chain.

ARGUMENT

I. The Decision Below Is Consistent with the Opinions of this Court

This Court has consistently held that personal jurisdiction cannot be exercised over a non-resident defendant unless that defendant has had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957). In *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958), a very concrete test was established for determining whether the requisite "minimum contacts" are present:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

In each of the last two terms, this Court has explicitly reaffirmed this limitation on the scope of personal jurisdiction. *Kulko* v. *Superior Court of California,* 98 S. Ct. 1690, 1698 (1978); *Shaffer* v. *Heitner,* 433 U.S. 186, 216 (1977).

This, then, is not an area in which the law is unclear or unsettled. This Court has established and repeatedly reaffirmed a concise test, leaving it to the lower courts to make the factual analyses necessary to apply that test. Obviously, such analyses may present difficulties, but those factual difficulties must be and can be resolved by the lower courts.

In the present case, the Court of Appeals specifically applied the principles established by this Court in

International Shoe, Hanson v. *Denckla* and the other cases noted above. The Court of Appeals found that respondent Weissenfels had not had sufficient contact with the State of Arkansas to warrant exercise of *in personam* jurisdiction:

> Weissenfels' contacts with Arkansas consist only of the fortuitous introduction of Weissenfels products into the forum state through the decision of Frank Fehr & Co., a British company. Weissenfels neither manufactured the defective chain nor sold or marketed it in the United States. Weissenfels' only apparent connection with the chain was that at one time it repacked and resold it to Frank Fehr & Co. These are insufficient "minimal contacts" with the forum state for Arkansas to exercise jurisdiction over Weissenfels. Weissenfels did not consciously solicit or purposefully avail itself of the privilege to conduct business in the forum state, as *Hanson* requires for the exercise of jurisdiction. 357 U.S. at 253. The Fehr Co. exercises control over the selection of the customers and other marketing decisions relating to the sales of the Weissenfels products which it purchases. We recognize that the State of Arkansas has a strong interest in providing a forum for its residents who are injured by defective products of foreign corporations and that Weissenfels did repackage and resell the chain to Frank Fehr & Co. Nevertheless, *in personam* jurisdiction simply cannot rest on such a frail foundation. (Footnote omitted.)

En Banc Op., Petn at A-7 - A-8.

As directed by this Court in *International Shoe*,[4] the Court of Appeals balanced respondent's *de minimus* contact with Arkansas against the great inconvenience of requiring respondent, an Italian corporation with no office or sales effort in the United States, to litigate in Arkansas. The Court noted that respondent is burdened substantially by the choice of that forum because it must hire local counsel and transport its witnesses from Italy to Arkansas. The Court of Appeals emphasized that because the expense "bears far more heavily on [respondent] than on other parties," maintenance of the suit against respondent in Arkansas generates unfair pressure for respondent to settle. En Banc Op., Petn at A-8. This is not a case in which an individual plaintiff is at a "severe disadvantage" vis-a-vis an American commercial enterprise with commercial activities in several states. *Compare McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957). Rather, the petition is an attempt by a New York-based concern to force an Italian corporation to answer in an inconvenient Arkansas forum regarding a sale consummated entirely in Europe.

In this connection, it should be noted that the original plaintiffs have not filed a petition for certiorari in this Court.[5] The party seeking certiorari is Fehr Brothers. Fehr Brothers has a pending cross-claim against the retailer; Fehr Brothers' only interest is to preserve its additional cross-claim against respondent Weissenfels. Yet that cross-claim need not be prosecuted in Arkansas. Fehr Brothers is a New York corporation, and respondent has conceded that it is prop-

[4] In *International Shoe*, the Court explicitly recognized that "[a]n 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant" to an analysis of the adequacy of the contacts. 326 U.S. at 317.

[5] The Court of Appeals recognized that "plaintiffs in this action do not suffer from a dearth of available defendants." En Banc Op., Petn at A-8, n.1. Indeed, subsequent to the decision below, the retailer, the wholesaler, and one of its suppliers have been impleaded as third-party defendants.

erly subject to suit in New York.[6] Thus, Arkansas has little interest in providing a forum for resolution of this potential controversy between Fehr Brothers and Weissenfels.

In sum, the Eighth Circuit applied the tests which this Court has mandated. It concluded that Weissenfels did *not* have sufficient "minimum contacts" with Arkansas and had *not* done any "act by which [it] purposefully avail[ed] itself of the privilege of conducting activities within" Arkansas. Petitioner does not contend that the Court below failed to apply the appropriate tests. Nor does it contend that this Court should abandon those tests. Rather, petitioner is dissatisfied with the *factual analysis* utilized by the Court of Appeals in applying the appropriate tests to this case. In petitioner's opinion, the Court below should have given greater weight to the facts that the Fehr organization had the exclusive distributorship for Weissenfels chain throughout North America, that Weissenfels' identity as the supplier was mentioned in one or more of the Fehr Brothers catalogs, and that Fehr Brothers derived approximately $74,000 in revenue from the sale of Weissenfels chain in Arkansas over a five-year period. The Court was well aware of all of these facts. That it did not find "minimum contacts" between Weissenfels and the State of Arkansas

[6] Respondent advised the Court of Appeals that "there are states, such as New York, where Weissenfels has had sufficient direct contacts so that jurisdiction over Weissenfels would be appropriate under the due process standards established by the Supreme Court." Brief of Appellant (Weissenfels) at 17.

is understandably disappointing to petitioner, but it provides no basis for granting certiorari.[7]

II. There is No Conflict Between the Decision Below and the Decisions of Other Courts of Appeals

In its decision in this case, the Court of Appeals followed the same criteria as have been consistently applied by all other circuits—the tests enunciated by this Court in *International Shoe, Hanson* v. *Denckla* and the other decisions discussed in part I, above. Petitioner does not contend that there is a split among the circuits as to these principles of *in personam* jurisdiction. Petitioner seeks to manufacture a disagreement by arguing that the *factual analyses* pursuant to these recognized legal principles have varied among federal courts. Specifically, petitioner contends that there is a "trend" in the case law which, if carried to "the next logical step," would find jurisdiction to be proper in this case simply because Weissenfels introduced its chain "into the stream of [international] commerce" and thus could "foresee" that it *might* be sold *anywhere*. Petn at 12.

Neither federal appellate nor district courts have found such a tenuous connection between the out-of-

[7] Petitioner also suggests—incorrectly—that the Eighth Circuit's decision has the effect of declaring the Arkansas long-arm statute unconstitutional. As this Court has cautioned "[e]very opinion is to be read having regard to the facts of the case and the question actually decided." Weaver v. Palmer Bros. Co., 270 U.S. 402, 414 (1926). The only issue decided by the Eighth Circuit was that, under the facts presented herein, Acciaierie Weissenfels is not subject to service of process in Arkansas. The constitutionality of the state's long-arm statute was not even considered. *Cf.* Kansas City Southern Ry. v. Anderson, 233 U.S. 325, 329 (1914). The Eighth Circuit has simply recognized that there is a due process limit on the scope of any state's *in personam* jurisdiction.

state defendant and the forum State to constitute the requisite "minimum contacts" for exercise of *in personam* jurisdiction.[8] To the contrary, the courts have consistently rejected jurisdictional arguments which are based upon nothing more than an allegation that the nonresident defendant placed its product in the stream of interstate or international commerce. *E.g.*, *Velandra* v. *Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964); *W. T. Grant Co.* v. *Unitika Tsusho KK*, Civ. No. 74-285 (D. Vermont, October 27, 1977) (attached as appendix hereto); *Pendzimas* v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961).

In *Velandra* v. *Regie Nationale Des Usines Renault, supra*, for example, a person injured in an automobile accident in the State of Michigan sought to sue a French automobile manufacturer which sold its product in the United States through a wholly-owned New York subsidiary, Renault, Inc. Renault, Inc. in turn distributed the automobiles to the midwest region through a wholly-owned subsidiary called Great Lakes, Inc. This regional distributor granted franchises to several Michigan dealers. Despite evidence that one of the three Renault dealers in Detroit had gross sales of more than $100,000 and that, upon each sale, a warranty from the French manufacturer was delivered to the purchaser, the Court of Appeals held that "no sufficient showing has been made with reference to sales of the defendant's products within Michigan to establish such minimum contacts within the State as to warrant subjecting the defendants to the personal jurisdiction of a court in Michigan." 336 F.2d at 297.

[8] There is no conflict between the Court of Appeals' decision and the Arkansas Supreme Court's interpretation of the state's long-arm statute. The state Supreme Court has never decided whether a non-United States distributor whose merchandise eventually finds its way into Arkansas is subject to service of process absent additional facts. Accordingly, one cannot accept petitioner's assumption that the Arkansas Supreme Court would disagree with the Court of Appeals' resolution of the pending matter.

Even more similar to the case at bar is *W. T. Grant Co.* v. *Unitika Tsusho KK, supra*, which is reproduced in the Appendix hereto. There W. T. Grant Co. ("Grant"), a major American retailer, was the defendant in a product liability action. Grant filed a third-party complaint against the Japanese manufacturer from which the product (pajamas) had been purchased. The record indicated that Grant had been a customer of the Japanese manufacturer for a number of years; that Grant had sent representatives to Japan to negotiate; and that Grant had purchased from the defendant more than $1,000,000 worth of children's pajamas annually. The shipment containing the allegedly defective product had been shipped F.O.B. a Japanese port directly to the United States.

Despite these contacts, the District Court specifically held that the manufacturer had not "purposefully availed itself of the privilege of conducting activities in the forum state." App. at 6a *citing Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). The court reasoned that a defendant cannot be said to have voluntarily invoked the laws of the forum state unless it could have specifically foreseen that the goods would be used in the forum state:

> Foreseeability in the context of *in personam* jurisdiction, especially in a situation involving international considerations such as the one present here, requires that the defendant has actual knowledge, or good reason to know, that the conduct will

have effect in the forum state. *See Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972).

The court noted that the Japanese defendant had denied any knowledge or concern as to where the goods were marketed by Grant:

> These averments, together with the fact that W. T. Grant had, at the time, stores in 43 states and an interest in a Canadian department store chain, greatly weakens [*sic*] any contention that this contact with Vermont was foreseeable in the sense discussed above, much less that Unitika had actual knowledge of it.

App. at 5a. Thus the Japanese defendant was held not to be susceptible to suit in Vermont.[9]

In its effort to portray a conflict among the circuits, petitioner cites *Eyerly Aircraft Co.* v. *Killian,* 414 F.2d 591 (5th Cir. 1969); *Duple Motor Bodies, Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir. 1969); *Ajax Realty*

[9] The *W. T. Grant* court relied upon Judge Friendly's opinion for the court in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972). In analyzing a question of personal jurisdiction in that case, Judge Friendly noted the general principle that a state may assert jurisdiction over an entity which causes effects within the state by an act done elsewhere, but warned that "[t]his is a principle that must be applied with caution, particularly in an international context." 468 F.2d at 1341. He emphasized that the effect must occur "as a direct and foreseeable result of the conduct outside the territory." *Id., quoting* Restatement (Second) of Foreign Relations Law § 18 (1965). In the view of the Second Circuit, "attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction. The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him." 468 F.2d at 1341.

Corp. v. *J. F. Zook, Inc.,* 493 F.2d 818 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); and *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F.2d 1137 (7th Cir. 1975). Petn at 11-13. These decisions are not in conflict with the Eighth Circuit's resolution of the instant case. In each of the cited decisions, the defendant had significant direct contacts with the forum state.

In *Eyerly Aircraft Co.* v. *Killian, supra,* upon which petitioner places principal emphasis, the defendant had regularly transacted business in the forum state:

> Included in this enumeration of contacts with Texas are the following: (1) sales and deliveries of amusement devices and parts directly into the state; (2) the extension of credit in the state; (3) the retention of liens on items sold; (4) the filing of such liens with state and county authorities; (5) the servicing of machines in the state; and (6) the solicitation of business in the state. These contacts with Texas were neither occasional nor sporadic—they were both continuous and substantial.

414 F.2d at 594-95 (footnote omitted). This abundance of direct contacts makes *Eyerly Aircraft* wholly inapposite here.

Equally inapposite are cases cited by petitioner which involved a defendant who was actually aware that the particular product was to be used or sold in the forum state. For example, in *Duple Motor Bodies, Ltd.* v. *Hollingsworth, supra,* the court stressed that the defendant had actual knowledge of the ultimate destination of its custom-made products:

> The [coach] bodies were designed and manufactured by appellant with the knowledge that they were to be used in Hawaii and were made with

> special modifications to adapt them for use there. Prior to purchase a representative of Maui Island Tours [the purchaser] went to London and visited appellant's factory, and with representatives of appellant and Vauxhall, discussed paint specifications. Following the sale, appellant responded to an order for spare parts from [the purchaser] and at that time solicited further business from that concern.

417 F.2d at 234-35. This actual knowledge is a far cry from the diffuse concept of "foreseeability" proffered by petitioner.

Similarly, in *Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975), the foreign defendant had actual knowledge that any injury which might occur from its acts would be injury to a resident of the forum. The nonresident defendant in that patent infringement action had originally sought a license under the patent from the Honeywell Corporation, which has its headquarters in Illinois, the forum state. The defendant, then, was clearly aware that the patent holder—the party to whom injury would occur if the patent were infringed—was a resident of the forum. It was on the basis of this actual knowledge that the Court of Appeals found that the defendant "should reasonably have anticipated" that Honeywell would suffer injury in Illinois. 509 F.2d at 1144. Indeed, the court explicitly distinguished *Honeywell* from the situation presented by the instant petition, noting that the defendant "was not merely a foreign manufacturer which sold to various foreign exporters, knowing that the exporters would, in turn, sell to distributors throughout the world, including the United States." *Id.*

The final case relied upon by petitioner, *Ajax Realty Corp.* v. *J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972),

cert. denied, 411 U.S. 966 (1973), involved a nonresident defendant whose direct contacts with the forum state made it clear that the defendant could "foresee" the use of its product in that state. In *Ajax Realty*, the defendant was a window frame manufacturer which, unlike respondent Weissenfels, had shipped its product directly into the forum state. When the window frames leaked, the defendant sent a representative there to see whether the frames could be repaired. It was these direct contacts with the forum which resulted in a finding that the defendant had "a reasonable expectation that the frames would be used in Virginia." 493 F.2d at 822. The Court of Appeals held that the application of the Virginia statute to the defendant "on these facts" did not violate due process. *Id.* at 823.

There is no conflict among the circuits. This Court has clearly set forth the criteria for the extension of *in personam* jurisdiction; the various Courts of Appeals have consistently applied those criteria. Where "minimum contacts" exist, *i.e.*, the defendant "does some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State," jurisdiction has been sustained.[10] But where, as was found to

---

[10] It is also instructive to contrast the case *sub judice* with then Judge Blackmun's opinion in Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965). In sustaining jurisdiction in a case of injury to a Minnesota resident, the Court emphasized that the product had been

> shipped . . . directly into the state and directly to the customer. There was no intervening dealer. Economy knew of the [product's] destination and of the Minnesota identity of the purchaser. It voluntarily placed its product on the Minnesota market, derived benefit therefrom, received the protection of Minnesota laws, and reasonably could have anticipated that

be the case here, the defendant's contacts with the state are extremely tenuous, the exercise of jurisdiction has consistently been rejected.[11]

A conflict among the circuits cannot be created by talk of a "trend" toward expanding jurisdictional reach. To the extent that any such "trend" may be perceived, it is a trend in the weighing of facts, not in the legal criteria applicable to *in personam* jurisdiction. Moreover, this Court has explicitly rejected the extension of any such trend to a point where direct and tangible contacts with the forum would no longer be required:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.

Hanson v. *Denckla*, 357 U.S. at 251.

Respondent respectfully submits that *only* "the eventual demise of all restrictions on the personal jurisdiction of state courts" would make it possible for the State of Arkansas to exercise *in personam* jurisdiction over respondent Acciaierie Weissenfels.

---

this activity would have consequences in the state. See Gray v. American Radiator & S.S. Corp., 22 Ill.2d 432, 176 N.E.2d 761, 766 (1961).

343 F.2d at 197.

[11] One district court has summarized the case law thusly:

> Suffice it to say that this court reads none of these cases to hold that any foreign manufacturer or distributor whose product reaches the forum state and causes injury therein, *in the absence of any additional facts*, is amenable to in personam jurisdiction in that state consistent with due process. Each case which upheld jurisdiction exhibited significant additional factors.

Uppgren v. Executive Aviation Services, Inc., 304 F. Supp. 165, 170 (D. Minn. 1969) (emphasis in original).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ROBERT D. WALLICK
Attorney for Respondent
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2050

Of Counsel:

RICHARD O. CUNNINGHAM
F. JOSEPH NEALON
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

WILLIAM H. ARNOLD, III
ARNOLD, ARNOLD, LAVENDER & ROCHELLE, LTD.
507 Hickory Street
P.O. Box 1938
Texarkana, Arkansas 75501

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

W. T. GRANT CO. (*Defendant/Third Party Plaintiff*)

v.

UNITIKA TSUSHO KK (*Third Party Defendant*)

Civil Action

File No. 74-285

Filed October 27, 1977

Memorandum and Order

This third party action derives from a products liability action instituted by Lisa Dufault against W. T. Grant Co. as the sole defendant. Grant, as a third party plaintiff with leave of the court, has undertaken to implead its supplier of the alleged defective product, Unitika Tsusho K.K., the third party defendant, under Rule 14(a), Fed.R.Civ.P. Service of the third party complaint was made on the strength of the Vermont long arm statute (12 V.S.A. §§ 855-856). Unitika has moved to dismiss the third party complaint by challenging the jurisdictional reach of the Vermont statute. Plaintiff Dufault filed a motion to sever the third party action. This court granted plaintiff's motion and denied the motion of Unitika without prejudice to renewal if plaintiff prevailed in the main action. Subsequently the jury rendered a verdict for the plaintiff and judgment was entered accordingly on February 18, 1977. W. T. Grant Co. having been found liable, third party defendant Unitika has renewed its motion to dismiss. Hearing on the motion was held on September 30, 1977.

The Vermont long arm statute [1] provides in essence that if contact or activity in the State of Vermont of, or imputable to, a foreign corporation is sufficient to support a Vermont personal judgment against it, the corporation shall be deemed to be doing business in the state and service may be made on the secretary of state in any action against the corporation arising out of that contact or activity.

Unitika contends that it has had no contact with Vermont and that none can be imputed to it through its activity elsewhere or through the activity of others. Grant, on the other hand, argues that when Unitika sold its products to Grant, knowing that Grant would distribute the product in the United States, Unitika knew or should have known that the product might be marketed in Vermont. Grant urges that such foreseeable distribution of Unitika's product by Grant brings Unitika within reach of the Vermont statute.

---

[1] 12 V.S.A. § 855 reads as follows:

§ 855. *Doing business as appointment of process agent*

If the contact with the state or the activity in the state of a foreign corporation, or the contact or activity imputable to it, is sufficient to support a Vermont personal judgment against it the contact or activity shall be deemed to be doing business in Vermont by that foreign corporation and shall be equivalent to the appointment by it of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity, and also shall be deemed to be its agreement that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served on the foreign corporation at its principal place of business in the state or country where it is incorporated according to the law of that state or country.—Amended 1967, No. 353 (Adj. Sess.), § 5, eff. July 1, 1968; 1971, No. 185 (Adj. Sess.), § 43, eff. March 29, 1972.

The question must be answered in accordance with state law. "Federal law" controls only on constitutional issues, such as whether the Vermont statute comports with the due process guarantees of the Fourteenth Amendment as embodied in the "minimum contacts" requirement enunciated in *International Shoe* v. *State of Washington*, 326 U.S. 310, 316 (1945). See *Arrowsmith* v. *United Press International*, 320 F.2d 219, 222 (2d Cir. 1963).

O'Brien v. *Comstock Foods, Inc.*, 123 Vt. 461 (1963), considered the question of *in personam* jurisdiction over a foreign corporation. In *O'Brien* the Vermont Supreme Court construed the Vermont long arm statute to establish what it termed a "vital factor," that the non-resident defendant intentionally and affirmatively acted in pursuit of its corporate purposes within the State of Vermont. This intentional and affirmative action may take the form of direct shipment of goods into the Vermont market or by way of transmittal through regular distributor presently serving Vermont. The plaintiff's pleadings must demonstrate that, in one of these ways or perhaps in some other way, "the defendant is causally responsible for the presence of the injuring agency within the State of Vermont." A plaintiff does not meet this burden by merely alleging that a defendant put its product "into the stream of commerce." Id. at 464-465; see also *Anderson* v. *Abex Corp.*, 418 F.Supp. 5 (D.C. Vt. 1975).

The third party defendant Unitika Tsusho K.K. is a Japanese corporate subsidiary of Unitika Ltd., a Japanese corporation, that is not a party to this action. The parent company manufactures various articles including children's pajamas which are then distributed and sold by Unitika Tsusho. W. T. Grant has been a customer of Unitika Tsusho since sometime prior to 1967 and, as such, has made several visits to Unitika's offices in Osaka, Japan on the subject of the sale of children's pajamas. Over the years these meetings have resulted in several purchases by Grant. During each of the years 1970 and 1971 Grant purchased

children's pajamas from Unitika Tsusho in an amount exceeding $1,000,000. One of the purchases is evidenced by purchase order #34-8 dated Oct. 12, 1970. According to Unitika, if they have made a sale of the pajamas in question to Grant, it would have been made under this purchase order. This particular sale was FOB Japanese Port, with the destination of Liberty Park, New Jersey, noted by Grant on its purchase order. This was consistent with their normal dealings which prevailed until November of 1970 when Grant opened its Far East Operations Office in Osaka.

Although on three occasions in 1969 and in the early 1970's Unitika Tsusho's representatives met in New York with W. T. Grant's employees to discuss sales, virtually all phases of the contractual negotiation and purchases occurred in Japan or by correspondence between New York and Japan. Other than these visits, the only direct contact with the United States has been by the parent company and has been in New York State. These contacts consisted of the incorporation of two subsidiaries, Unitika America Corp. and Unitika Marketing Services, Inc., in 1973 and 1974 respectively, after the sale of the pajamas to plaintiff Dufault by W. T. Grant in Burlington.

Unitika Tsusho denies, through affidavits and answers to interrogatories, any contact with the State of Vermont, either through direct shipments to the state or through indirect shipments by way of regular distributors. It also denies ownership of any type of property within the state, having officers or employees in the state or visiting with business purposes, or of engaging in any type of conduct in the State of Vermont. W. T. Grant has failed to adduce any information to rebut these denials.

Personal jurisdiction in Vermont over Unitika Tsusho turns entirely on the fact that Unitika sold children's pajamas to W. T. Grant in Japan, which Grant then shipped to the United States and distributed to its retail stores. The pair of pajamas which gave rise to the main action were

sold to Lisa Dufault's grandmother at Grant's Burlington store. On principles stated by the Vermont Supreme Court in *O'Brien* v. *Comstock Foods, Inc.*, the facts presented do not support personal jurisdiction over Unitika Tsusho. The bare allegation that the defendant placed goods in the stream of commerce, which were ultimately sold in Vermont, standing alone is not sufficient. There is no indication that Unitika had any involvement in, or knowledge of Grant's marketing plans for the pajamas it purchased from Unitika. To the contrary, Unitika's denial of any such knowledge or involvement is not opposed.

Foreseeability in the context of *in personam* jurisdiction, especially in a situation involving international considerations, such as the one present here, requires that the defendant has actual knowledge, or good reason to know, that the conduct will have effect in the forum state. See *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

The third party complaint does charge that Unitika knew that Grant would distribute the pajamas here involved through its chain of retail stores situated in the United States and that the pajamas would be sold in Vermont by Grant. However, in affidavits Kazuhide Kajiki, general manager at the relevant time, and Hisao Sato, manager of Unitika's export-import department, deny any knowledge or concern with where Grant planned to distribute the pajamas. These averments, together with the fact that W. T. Grant had, at the time, stores in 43 states and an interest in a Canadian department store chain, greatly weakens [*sic*] any contention that this contact with Vermont was foreseeable in the sense discussed above, much less that Unitika had actual knowledge of it.[2] The present case is

[2] Due to the fact Grant filed a petition under Chapter XI of the Bankruptcy Act on October 2, 1975, the precise nature and degree of Grant's interest in these stores and the Canadian chain is in doubt. However, the figures are valid for time involved in the sale and distribution of the pajamas by Grant in this matter.

distinguishable from *Miller* v. *Cousins Properties Inc.*, 378 F.Supp. 711 (D.C. Vt. 1974). There personal jurisdiction was asserted and sustained as to the defendant North American Rockwell, the manufacturer of an airplane which crashed in Vermont. The contact in Vermont was foreseeable from the very nature of the product involved (see also *Gill* v. *Fairchild Hiller Corp.*, 312 F.Supp. 916 (D.C.N.H. 1970)) and the defendant Rockwell was authorized to do business in this jurisdiction. Neither factor is present here. Unitika has submitted the affidavit of Hisao Sato which affirms that Unitika is not registered or qualified to do business in Vermont. Moreover, pajamas obviously are not comparable to aircraft designed for long range transportation in terms of their likelihood of contact with Vermont.

Given this state of the record, it cannot be said that Unitika has "purposefully availed itself of the privilege of conducting activities in the forum state." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1957). Nor has it voluntarily come into contact with or intentionally participated in the Vermont market as required by *O'Brien* v. *Comstock Foods, Inc.* To the contrary, Unitika's actions throughout its dealings with Grant, whether intentional or fortuitous, have effectively insulated its activity from Vermont and apparently from the other states with the exception of New York.[3]

The facts presented fail to meet the demands required of personal jurisdiction over Unitika in Vermont under the State's long arm statute. The record fails to yield up sufficient contacts by Unitika in Vermont to generate the power in the courts of this jurisdiction to hold this corporation liable as a third party defendant within the teaching of *Hanson* v. *Denckla, supra*, 357 U.S. at 251.

---

[3] It appeared during argument that Grant's insurer, Liberty Mutual Insurance Company, has instituted an action against Unitika Tsusho K.K. in the Supreme Court of the State of New York in New York County, but has yet to effectuate service of process on Unitika.

The motion of Unitika Tsusho K.K. to dismiss the third party complaint for lack of personal jurisdiction is granted. The Clerk will enter an order of dismissal.

Dated at Rutland, in the District of Vermont, this 27th day of October, 1977.

/s/ JAMES S. HOLDEN
James S. Holden
Chief Judge